

**IN THE STATE OF KANSAS
BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENT**

In the Matter of:

Commence Construction Timeframe
of Air Emission Source
Construction Permit for
Sunflower Electric Power Corporation
Holcomb Station

Source ID No.: 0550023

**ORDER GRANTING SECOND EXTENSION
OF COMMENCE CONSTRUCTION PERIOD**

NOW on this 25th day of September, 2018, the above-captioned matter comes before Jeff Andersen, Secretary ("Secretary") of the Kansas Department of Health and Environment ("KDHE") on the request for an extension of the commence construction deadline under K.S.A. 77-616 by Sunflower Electric Power Corporation ("Sunflower" or "Permittee"). The Secretary has reviewed the facts and law. Based upon such review and upon due consideration the Secretary grants the request for a second extension of the commence construction deadline.

FINDINGS OF FACT

1. On December 16, 2010, KDHE issued a permit to Permittee to construct and operate one new 895 megawatt coal fired generating unit and associated equipment ("Holcomb 2") to be located at the site of the existing Holcomb Generating Station.
2. On January 14, 2011, the Sierra Club filed a petition for judicial review of the permit.
3. On July 20, 2011, the Secretary issued an Order Granting Application for Stay, stopping the running of the 18-month commence construction period on June 1, 2011, with the remainder of the period (twelve months and two weeks) to resume upon final disposition of this matter by the Kansas Supreme Court.
4. On October 4, 2013, the Kansas Supreme Court remanded the permit back to KDHE to:

- a. Set limits for one-hour average emission rates for oxides of nitrogen (NO_x) and sulfur dioxide (SO₂) to assure compliance with the federal regulations establishing one-hour nitrogen dioxide (NO₂) and SO₂ National Ambient Air Quality Standards (NAAQS); and
 - b. Apply new Hazardous Air Pollutants (“HAPs”) emission limits to the H2 steam generator. *Sierra Club v. Moser*, 298 Kan. 22 (2013).
5. On January 16, 2014, KDHE issued notice of the proposed Permit Addendum to address the issues for which the Supreme Court remanded the permit. A public comment period followed.
6. On May 30, 2014, KDHE issued the Permit Addendum as a final order of the Secretary.
7. On June 6, 2014, the Sierra Club filed a Petition for Reconsideration with the Secretary pursuant to K.S.A. 65-3008a.
8. On June 19, 2014, the Secretary issued an Order Denying the Petition for Reconsideration.
9. On June 27, 2014, the Sierra Club filed a Petition for Judicial Review in the Kansas Court of Appeals challenging the issuance of the Permit Addendum.
10. On October 9, 2014, the Secretary issued an Order Continuing the Stay, which clarified that the stay had remained in effect during the reissuance of the permit with addendum.
11. On February 11, 2015, KDHE issued its Order Granting Extension of Commence Construction Period extending Permittee’s commence construction deadline. This Order extended the deadline by five months and two weeks, thereby giving the Permittee a “re-set” of the full eighteen (18) months in which to commence construction.
12. On March 27, 2017, KDHE notified the Permittee that the commence construction period began that day due to resolution of the litigation. The Permittee’s commence construction period was therefore set to end on September 27, 2018.
13. On August 29, 2018, Sunflower requested a second extension of the commence construction period for eighteen (18) months, i.e. until March 27, 2020. This request is attached to this Order.

CONCLUSIONS OF LAW

14. The Secretary has authority to grant an extension to the commence construction period under K.A.R. 28-19-350(b)(1), which adopted by reference 40 C.F.R. § 52.21(r)(2), which states:

Approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The [Secretary] may extend the 18-month period upon a satisfactory showing that an extension is justified.

15. The U.S. Environmental Protection Agency (“EPA”) provided a Memorandum dated January 31, 2014, titled “Guidance on Extension of Prevention of Significant Deterioration (PSD) Permits under 40 CFR 52.21(r)(2)” (“Page Memo”) that clarifies what EPA considers “adequate justification” for such an extension.

16. Although Kansas is a State-Implementation-Plan-approved state for Prevention of Significant Deterioration permitting and the Page Memo is not binding on KDHE, KDHE still looks to the Page Memo as persuasive.

17. The Page Memo states that in “rare circumstances” a source can provide a “detailed justification of why [it] cannot commence construction by the current deadline” that could be found sufficient for purposes of granting a second extension without a substantive re-analysis and update of PSD requirements. *Page Memo* at 5.

18. Sunflower has provided a detailed justification in its request, and KDHE believes that this is in fact a rare circumstance stemming from the litigation that continued for more than six years. In addition, Sunflower has had to contend with changes to the Southwest Power Pool and the dramatically increased use of renewable energy sources.

19. KDHE has considered the following technology and air quality standard issues raised in the Permittee’s request and finds that they would not substantively change the terms of the permit:

- a. NSPS Subpart TTTT: Because construction did not commence on Holcomb 2 before January 8, 2014, the facility is not subject to NSPS Subpart TTTT, pursuant to 40 C.F.R. 60.5509(b)(10).

Holcomb 2 will, pursuant to NSPS Subpart TTTT, request and receive a unique standard issued by EPA. This process was anticipated by the NSPS Subpart TTTT final rule at 80 Fed.Reg. 64542-3.

- b. Best Availability Control Technology (“BACT”) for greenhouse gases (“GHG”): The Kansas Supreme Court upheld the exclusion of BACT for GHG for this permit in its decision issued in *Sierra Club v. Mosier*, 305 Kan. 1090 (2017).
- c. Ambient air quality analysis: In its request, the Permittee raised the issue of the new standards requiring analysis of secondary formation of PM_{2.5} and ozone found at 40 C.F.R. § Pt. 51, App. W., which became effective May 22, 2017. In consultation with EPA, KDHE has no reason to believe that the standards contained in the existing permit would not comply with any modeling based on these new standards.

20. KDHE has not identified any new permits that have been issued for coal-fired power plants since the issuance of this permit or any additional new technologies or standards that would require substantive changes to the permit.

21. The Page Memo states that if a request for a second extension of the commence construction period is made, the permitting authority “will evaluate on a case-by-case basis whether a second permit extension is justified.” *Page Memo* at 6.

22. Based on the aforementioned circumstances delaying construction of this facility and the lack of significant substantive changes that would be made in a re-issued permit, KDHE finds this to be a case where a second permit extension is justified.

23. The Page Memo additionally states that if such an extension without a substantive review of PSD requirements is granted, “EPA does not see the same basis for providing an opportunity for public comment on an extension of the deadline.” *Id.* at 7.

24. The Page Memo states that an extension of the commence construction period does not “modify” the permit. *Id.* at 8. This permit is therefore not being “issued, modified, renewed or reopened” and does not require public comment under K.S.A. 65-3008a. The Page Memo encourages KDHE to notify the public of the permit extension decision. *Id.* at 8. KDHE is therefore posting this Order on its website.

ORDER

25. The Permittee has provided adequate justification for its request for an extension that is within the EPA’s guidance in its Page Memo, and KDHE has not found that significant substantive changes would be required if the permit were re-reviewed and re-issued.

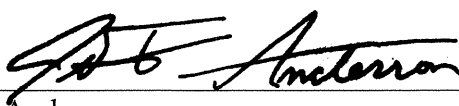
26. It is therefore ordered that the extension to the commence construction period is granted. The Permittee shall receive eighteen (18) additional months to commence construction under the current permit, and this period shall start to run September 28, 2018, and shall end March 27, 2020.

27. If Permittee fails to commence construction of Holcomb 2 by the end of the second extension, the permit shall lapse. KDHE shall not grant further extensions of this permit.

28. A party aggrieved by this Order may file an appeal with the Office of Administrative Hearings pursuant to the Kansas Administrative Procedures Act, K.S.A. 77-501 *et seq.* A request for a hearing must be submitted in writing within eighteen (18) days of the date this Order was mailed. The request must be submitted to Mr. Bob L. Corkins, Director, Office of Administrative Hearings, 1020 South Kansas Avenue, Topeka, Kansas 66612-1327.

Dated this 25 day of September, 2018.

IT IS SO ORDERED.


Jeff Andersen Ag
Secretary